

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

Carriage of the Transmissions)
of Digital Television Broadcast Stations)

Amendments to Part 76)
of the Commission's Rules)

CS Docket No. 98-120

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COMMENTS OF CABLEVISION SYSTEMS CORPORATION

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TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY	1
I. THE FCC HAS NO LEGISLATIVE MANDATE TO IMPOSE DIGITAL MUST-CARRY REQUIREMENTS DURING THE TRANSITION PERIOD.....	4
A. The Cable Television Consumer Protection And Competition Act Of 1992	4
B. The Balanced Budget Act Of 1997	7
II. THE FACTUAL RECORD SHOWS NO CLEAR NEED FOR DIGITAL MUST- CARRY REQUIREMENTS	7
III. DUAL CARRIAGE REQUIREMENTS DURING THE DIGITAL BROADCASTING TRANSITION PERIOD CANNOT SURVIVE FIRST OR FIFTH AMENDMENT SCRUTINY	9
A. There Is No Important Government Interest In Protecting Dual Television Broadcast Station Carriage During The Transition To Digital.....	10
1. Broadcasters' Digital Offerings Are Not Likely To Be Directed To Issues Of Overriding Local Concern And Importance	10
2. Cablevision's Current Regional And Local Programming Channels Are At Least As Valuable To Cable Consumers As The Programming Digital Broadcasters Are Likely To Offer	11
B. Must-Carry Rules Are Not Clearly Necessary To Protect Digital Broadcasters.....	12
C. Less Restrictive Alternatives Exist To Additional Must-Carry Requirements.	14
D. Dual Must-Carry Requirements Violate The Fifth Amendment.	14
CONCLUSION	15

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COMMENTS OF CABLEVISION SYSTEMS CORPORATION

Cablevision Systems Corporation ("Cablevision") submits these comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.^{1/}

Cablevision is one of the largest operators of cable television systems in the United States, with systems principally clustered in three major markets -- New York, Boston and Cleveland. It is also one of the most active creators of diverse national, regional and local programming services through its programming arm, Rainbow Media Holdings, Inc. ("Rainbow"). Cablevision would therefore be significantly impacted by any new must-carry rules adopted during the transitional period from analog to digital broadcasting.

INTRODUCTION AND SUMMARY

The Commission seeks comment on a variety of complex issues relating to the carriage by cable operators of digital television stations, including highly technical issues relating to the interoperability of digital television stations, cable systems and digital viewing components.

^{1/} *Carriage of the Transmissions of Digital Television Broadcast Stations, Notice of Proposed Rulemaking*, FCC 98-153 (rel. July 10, 1998) (the "NPRM").

While Cablevision understands the FCC's desire to foster meaningful dialogue on the many complex technical issues raised by digital must-carry, it is both inappropriate and premature for the Commission to attempt to resolve them through any governmental mandate. Cablevision agrees with those broadcasters that argue that "this is an issue that can be worked out between broadcasters and the MSOs."^{2/}

The very breadth of the FCC's NPRM itself demonstrates the prematurity of any effort to impose digital must-carry requirements. The Commission seeks comment on virtually every issue that relates to the transition to the digital world -- scores of issues and sub-issues are listed for comment. If, as the Commission appears to believe, answers to each are necessary prerequisites to an informed decision on the need for digital must-carry requirements, this is itself the best example of the folly of attempting to formulate a regulatory scheme while so many fundamental pieces of data remain lacking.

To impose must-carry regulations now would place the broad diversity of programming offerings that cable consumers currently enjoy in jeopardy. Broadcasters already enjoy a preferred position on a substantial channel segment of Cablevision and other cable operators. In New York City alone, 25 of Cablevision's 79 channels on its Bronx and Brooklyn systems are currently earmarked for analog broadcasters and public, educational and governmental access. Twelve commercial stations and four noncommercial stations (16 in total) have must-carry rights on these systems today. To give each of these stations a second must-carry channel would double their impairment of Cablevision's programming selection function.

^{2/} "Must-Carry Talks Should End Amicably," Telecommunications Reports (Oct. 5, 1998) (quoting Mel Karmazin, President/CEO of CBS, Inc).

Like any other program supplier, broadcasters should earn carriage by bringing something to the marketplace that subscribers want. They should not be given superior carriage rights by government fiat, at the expense of programming services created or selected by a cable operator that may offer greater localism or diversity. Carriage should not be compelled because of the identity of the programmer rather than the merits of the programming.

The business of Cablevision is to create the very best menu of video choices for its customers, digital as well as analog. Cablevision created the nation's first regional news service, News 12 Long Island, during the 1980's. It has since replicated it in four of the other New York City metropolitan areas, as well as launching Neighborhood News 12, which offers unique news coverage of the Long Island community. Cablevision also launched this August the MSG Metro Channels, recently hailed as a unique example of cable's commitment to "hyperlocalism."^{3/}

Digital television is, Cablevision agrees, "the future of TV."^{4/} Cablevision is also planning to produce programming in HDTV. This programming should have no less ability to seek and gain carriage on its own or other cable systems than a broadcaster's digital channel.

Interim digital signal must-carry requirements are not legislatively mandated. Any digital must-carry regulations adopted during the transition period would be constitutionally suspect under the Supreme Court's standards in the *Turner* decisions^{5/} and would violate the takings clause of the Fifth Amendment. Given the rapid economic and technological changes occurring in the cable and broadcast industries, the Commission should let the marketplace drive the

^{3/} "Dolan's 'Hyperlocalism,'" Multichannel News, October 5, 1998 at 52.

^{4/} Remarks of William E. Kennard, Chairman, Federal Communications Commission, to The International Radio and Television Society, New York, New York (Sept. 15, 1998).

^{5/} *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"); *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

development of and demand for digital services, and let any necessary regulations flow from the digital world as it ultimately emerges from the unrestricted efforts of cable operators and broadcasters to co-exist and complement each other.

I. THE FCC HAS NO LEGISLATIVE MANDATE TO IMPOSE DIGITAL MUST-CARRY REQUIREMENTS DURING THE TRANSITION PERIOD

While the FCC's analog must-carry requirements were supported by and premised on specific Congressional findings regarding the need for and value of local broadcasting, no similar support in legislative history exists for dual carriage requirements for both analog and digital broadcast signals. The imposition of digital must-carry requirements would, in fact, contravene many of the goals Congress sought to achieve when it enacted must-carry rights for analog broadcast stations in 1992.

A. The Cable Television Consumer Protection And Competition Act Of 1992

Congress enacted the mandatory cable carriage provisions of the 1992 Cable Act^{6/} based on its findings that the requirements were necessary, among other things, to maintain and ensure the continued availability of free over-the-air television broadcast service.^{7/} Congress found that, due to a variety of factors attributable in large part to the physical characteristics of analog television and cable transmission, cable operators enjoyed a market position that gave them both the power and the incentive to decline carriage to their broadcast competitors.^{8/}

Congress also found that there were public benefits gained from a diversity of programming and multiplicity of voices; that these benefits would result from programming

^{6/} Pub. L. No. 102-385, 106 Stat. 1460, codified at 47 U.S.C. §§ 521 *et seq.*

^{7/} *Id.*, § 2(a).

^{8/} *Id.*

provided through multiple media, including television broadcasters; and that in particular there were public benefits from locally originated programming, which was then, Congress believed, offered primarily by local television broadcasters.^{9/} Because Congress determined that without cable carriage local broadcasters were unlikely to survive, it required cable operators to carry their signals.^{10/}

In contrast, nothing in either the legislative history or the language of the 1992 Act suggests that Congress intended that television stations have dual carriage rights during the transition period. In the only section of the 1992 Act where Congress addressed must-carry for digital television stations, it directed the Commission to examine the issue *after* the transition to a new signal format had occurred for “broadcast signals . . . which have been changed’ to the new digital standards.^{11/} The Commission may not use this language now to impose interim must-carry requirements on cable operators.

In fact, granting must-carry status to digital television stations during the transition period would conflict with Congress’ 1992 Act programming diversity objectives. Requiring dual carriage of a television station’s two signals is not necessary to enhance the availability of free, over-the-air broadcasting. Each qualified station’s analog signal is already available to the public. But if cable operators are required to carry both signals, the net diversity and breadth of programming available to the public will necessarily be reduced, since duplicative broadcast programming will fill channel space that might otherwise be occupied by diverse new non-broadcast programming services. If anything, dual carriage requirements conflict with Congress’

^{9/} *Id.*

^{10/} *Id.*, §§ 534, 535.

^{11/} *Id.*, § 534(b)(4)(B).

intent that must-carry requirements not result in carriage of duplicative programming, for which they inserted a special exemption to the must-carry requirements.^{12/}

For the majority of the public who does not make the significant financial investment required to receive digital programming before the transition is complete, each broadcaster's second channel will be inaccessible, and a complete loss to them. Since the digital television sets coming on the market are currently priced between \$6000 and \$8000, manufacturers do not expect more than 50,000 homes to have digital television sets in the first year.^{13/} Some broadcasters are apparently arguing that cable systems should have to carry their signals because the signals are unreliable when received by rooftop antenna, and impossible to pick up using indoor "rabbit ears."^{14/} But this is a rationale for putting greater effort into technological solutions, not government fiats.

Finally, granting digital television signals must-carry status is unlikely to increase local broadcast programming, and forcing cable operators to devote valuable channel capacity to duplicative signals will actually lessen the chance for new locally oriented cable programming to obtain carriage. This would be extremely inopportune timing for new programming services developed by cable operators devoted to issues of local interest, such as Rainbow's MSG Metro Channels and News 12 channels, that are seeking channel space from neighboring cable systems.

^{12/} *Id.*, § 534 (b)(5).

^{13/} See, e.g., "Digital TV hits the Big Apple," *The New York Post*, Aug. 20, 1998.

^{14/} See "HDTV: Not Worth Losing C-Span," *The Washington Post*, July 23, 1998 at A19.

B. The Balanced Budget Act Of 1997

The Balanced Budget Act of 1997 ("BBA")^{15/} promotes the conversion to digital, and requires any television station attempting to retain its analog channel beyond the statutory deadline of December 31, 2006 to demonstrate the reasons why the conversion to digital has not taken place.^{16/} Nothing in the BBA, however, suggests that Congress intended to allow television stations dual must-carry rights during the transition period. In the BBA legislative history, Congress specifically stated that it was "not attempting to define the scope of any MVPD's 'must carry' obligation for digital television signals" and that whether to grant such stations must-carry status was a decision "for the Commission to make at some point in the future."^{17/}

II. THE FACTUAL RECORD SHOWS NO CLEAR NEED FOR DIGITAL MUST-CARRY REQUIREMENTS

Since Congress has not directed the Commission to require cable operators to carry television stations' digital signals, the Commission is free to wait until such time as a factual record has been developed that shows a need for digital must-carry regulations. No such need has yet been shown. In fact, the technical and economic direction of digital broadcasting is in such flux that the necessary record is unlikely to be developed in the near term.

^{15/} Pub. L. No. 105-33, 111 Stat. 251 (1997).

^{16/} 47 U.S.C. § 309(j)(14).

^{17/} H.R. Rep. No. 105-217 (July 30, 1997) at 576-77.

As Chairman Kennard recently emphasized, at this point "nobody has the answer to the who, what, where, when and how of digital TV."^{18/} It is clear that the conversion to digital broadcasting is not going as smoothly as all parties, including the Commission, had hoped.

First, the broadcasting industry is not ready for the conversion to digital. Tower siting problems and similar technological problems have caused many broadcasters to slow down their conversion schedule, and many simply need more time to work out their business and programming plans. Moreover, the affected industries have not yet determined what standards will govern the "firewire," the cable that will connect the television display unit with set-top boxes and other devices, and how related copyright issues will be resolved.^{19/} Broadcasters and programmers have not determined standard programming formats between the 1080 interlace and the 720 progressive format so as to ensure compatibility of the signals with carriage systems.^{20/} The broadcast and cable industries believe that they can develop their business plans cooperatively, but this process will take time, and should not be rushed.

The consumer electronics industry also is not ready for the conversion to digital. As of yet, equipment manufacturers are not required to build receivers to receive any particular format, which means that some converter boxes may not function with DTV-capable television sets. Since the first generation digital television sets will cost \$6,000 - \$8,000, those consumers who

^{18/} Remarks of William E. Kennard, Chairman, Federal Communications Commission, *supra*. See also "Digital TV: All buzz, no broadcasting?," The Star-Ledger, Aug. 9, 1998 at BUS-1 ("It's anyone's guess when there will be signals to receive").

^{19/} See, e.g., "Prodded by Kennard, CEMA, Cable Near 'Fire Wire' Spec," Multichannel News, Aug. 31, 1998 at 47.

^{20/} "Hindery sees DTV deals before fall," Broadcasting & Cable, July 27, 1998 at 36.

make this significant investment could be discouraged if what is touted as cutting-edge technology cannot function as promised, and may not give digital a second chance.

The FCC should not attempt to impose rules on this fluctuating state of play. Cablevision agrees with Chairman Kennard that the government should not “micromanag[e]” how the industry develops digital technology,^{21/} but should let the industry develop the technology, the business plan, and the programming to make digital succeed.

III. DUAL CARRIAGE REQUIREMENTS DURING THE DIGITAL BROADCASTING TRANSITION PERIOD CANNOT SURVIVE FIRST OR FIFTH AMENDMENT SCRUTINY

Any must-carry regulations imposed on the cable industry must be able to withstand constitutional scrutiny. The Supreme Court recognized in the *Turner* decisions that cable operators and programmers are fully protected First Amendment speakers, and that mandatory carriage requirements infringe their protected speech rights.^{22/} Thus, the Commission bears a heavy burden of proof to justify such regulations.

Under the standards articulated in the *Turner* decisions, any digital must-carry requirements would be constitutionally infirm in the absence of detailed findings regarding the governmental interest in imposing such regulations, a real need for such regulations, and a showing that such regulations would advance the government’s interest in a direct and material way and are properly tailored to limit only the amount of speech necessary to achieve the government’s goals. However, as it now stands, there is no clear governmental interest in requiring dual carriage during the transition period. There is no evidence of any need for

^{21/} “*Digital Commerce: A slow-motion train wreck in setting technology standards for a forthcoming era of television*,” The New York Times, Sept. 28, 1998 at C3.

^{22/} *Turner I*, 512 U.S. at 636-37.

regulatory action at this time. And there is no showing that regulatory action taken would actually address any government needs in a direct and material way. In contrast, it is clear that cable systems forced to carry dual analog and digital signals of broadcasters will suffer a significant loss in diversity of programming and programming sources, to the clear detriment of cable subscribers, and will suffer a loss of their property without just compensation.

A. There Is No Important Government Interest In Protecting Dual Television Broadcast Station Carriage During The Transition To Digital.

1. Broadcasters' Digital Offerings Are Not Likely To Be Directed To Issues Of Overriding Local Concern And Importance

The government cannot show any important interest requiring further interference with cable operators' right of free speech. It is highly doubtful whether the programming offered by digital broadcasters is likely to be sufficiently unique to merit overriding the First Amendment rights of cable operators and programmers. As Chairman Kennard recently questioned, "[a]s cable operators create local programming, particularly news and public affairs shows, and with almost three quarters of Americans actually paying to receive these channels, what remains that makes broadcasters unique? And is this uniqueness significantly tangible, demonstrable, and assured to justify requiring cable carriage?"^{23/} In the absence of compelling evidence demonstrating that the answer to this question is a resounding "yes," the Commission cannot begin to defend the imposition of mandatory carriage rules.

^{23/} Remarks of William E. Kennard, *supra*.

**2. Cablevision's Current Regional And Local Programming Channels
Are At Least As Valuable To Cable Consumers As The Programming
Digital Broadcasters Are Likely To Offer**

In fact, the Commission will find, upon the development of the record it seeks, that broadcast television stations no longer offer “unique” content. New cable programming services launch constantly. Recently, cable has developed more locally-oriented programming channels. Rainbow has developed and launched several regional networks in New York, New Jersey and Connecticut -- the News 12 Regional Networks and the MSG Metro Channels -- that offer programming specifically tailored to the interests of those communities receiving the programming.

The News 12 Regional Networks produce five separate and distinct program services in the New York television market. Each one is a 24-hour per day news service that provides full television coverage to its own region. News 12 Long Island services Nassau and Suffolk Counties, News 12 Westchester services Westchester County, News 12 The Bronx services the Bronx, News 12 Connecticut services the Fairfield County, Connecticut area, and News 12 New Jersey services the 14 counties of northern and central New Jersey.

These networks provide news, weather, traffic, and special warning information intended specifically for residents of the areas they reach, including live coverage of breaking news events in the community. News 12 The Bronx's coverage, for example, reflects the diverse nature of the Bronx and the area's deep sense of community. Additionally, Cablevision has launched Neighborhood News channels serving specific towns and villages on Long Island with “hyperlocal” news programming such as local school reports, community events, and business development coverage.

Rainbow's latest regional programming services, the MSG Metro channels, were launched August 5, 1998, further demonstrating Cablevision's commitment to providing its subscribers with programming tailored to the interests of their local communities. Cablevision has committed over \$100 million to launch the three channels -- MSG Metro Guide, MSG Metro Traffic & Weather, and MSG Learning Center -- which offer programming dedicated to regional arts and entertainment, traffic, weather and education, and occasional sports events. The Learning Center will provide separate blocks of programming for both high-school students and adults, devoted to individual topics each day, such as careers and computers. If digital broadcasters have a right to any available channel space that opens up, the MSG Metro Channels cannot hope for carriage on Cablevision's neighboring cable systems.

Cable programmers in many other areas of the country also offer regional and local programming. News Channel 8 in Washington, D.C. is but one example. Thus, at least one of the interests of the viewing public that Congress was concerned about in 1992 is no longer uniquely served by broadcasters.^{24/}

B. Must-Carry Rules Are Not Clearly Necessary To Protect Digital Broadcasters.

Even if the government could demonstrate that there is a substantial public interest in the carriage by cable operators of both analog and digital television signals, it is impossible at this juncture to determine whether must-carry rules are necessary to protect that interest. The conversion to digital will be an evolutionary process that varies from market to market,

^{24/} Cablevision and other cable operators are also planing to produce HDTV programming. Rainbow expects to launch in mid-1999 an HDTV service that will provide live event programming from such Cablevision-owned venues as Radio City Music Hall and Madison Square Garden on a pay-per-view and subscription basis.

depending largely on the existing state of technology in the market, the level of consumer interest, and how well the business plans of the cable programmers, operators and television broadcasters can be coordinated. There is simply too much uncertainty regarding how digital compression technology will function, and when the conversion to digital will occur,^{25/} for broadcasters to argue that new mandatory carriage rules are necessary.

As the Commission recognizes, the stations that are scheduled to become digital in the near future are the ones most likely to exercise the retransmission consent option, even if digital must-carry requirements are in place. Broadcasters themselves have acknowledged that digital must-carry is inappropriate. CBS President and CEO Mel Karmazin, for example, believes that it is "hypocrisy" for broadcasters to encourage deregulation in every area but must-carry, and that the creation of superior broadcast programming is "our form of must carry."^{26/}

In fact, history has shown that cable operators voluntarily carry the substantial majority of analog broadcast stations, and virtually all analog broadcast stations with any measurable viewership. Cable operators such as Cablevision will be similarly likely -- indeed, eager -- to carry voluntarily the digital broadcast television stations that develop content desired and watched by cable subscribers.

If the Commission genuinely intends, as Chairman Kennard has proposed, to "ensure that the public interest is paramount"^{27/} in the digital world those broadcasters who fail to develop programming formats of interest to the public should not be rewarded by the Commission with

^{25/} In a recent interview, Commissioner Powell stated that government policy should not rest too strongly on the belief that the conversion will happen on schedule. *See Cable Monitor, supra*, at 11.

^{26/} *Communications Daily*, October 2, 1998 at 2.

^{27/} Remarks of William E. Kennard, *supra*.

cable carriage. The Commission should let cable operators and broadcasters work together to establish programming line-ups that most reflect and satisfy the interests of their viewers. Mandatory carriage regulations will only distort this natural cooperative effort, and disrupt the marketplace, without providing any additional benefits.

C. Less Restrictive Alternatives Exist To Additional Must-Carry Requirements.

Even if the Commission determines that the viability of digital television signals is an important governmental interest, and that must-carry rules might advance that interest, it would still be nearly impossible for it to prove that mandatory carriage requirements would be a narrowly tailored way of achieving its goals. As the Commission recognizes,^{28/} many legal and technical developments have taken place since the 1992 Cable Act and the *Turner* decisions that make other, less restrictive alternatives more attractive options.

The Telecommunications Act of 1996 removed restrictions on antenna placement^{29/} that had discouraged the over-the-air reception of broadcast signals. Input selector (“A/B”) switches, which were dismissed in the *Turner* case as too inconvenient to be a viable alternative, can now be built directly into television receivers and accessed with the same remote control device that operates a television's cable reception functions. These developments reduce broadcast stations' dependence on cable carriage as the only, or even the principal, means to survival.

D. Dual Must-Carry Requirements Violate The Fifth Amendment.

Cablevision concurs with the National Cable Television Association (“NCTA”) that the imposition of dual must-carry requirements would violate the Fifth Amendment, and

^{28/} See NPRM, ¶ 16.

^{29/} 47 U.S.C. § 303.

incorporates NCTA's arguments by reference. Under the standards set forth by the Supreme Court in *Loretto Teleprompter v. Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982), any permanent occupation of private property authorized by the government, even if "minor," constitutes a taking of that property "for which just compensation is due." Any attempt by the government, therefore, to "take" some of a cable operator's channels without compensation is unconstitutional.

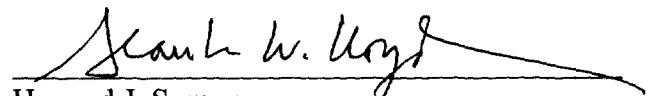
CONCLUSION

The lack of demonstrable need for, or Congressional mandate supporting, the imposition of digital must-carry requirements during the transition period, the likelihood that any such requirements will suffer from severe constitutional weakness, and the clear potential for severe harm to cable operators, programmers, and consumers make it premature for the Commission to enact regulations mandating the carriage of both digital and analog television signals. Cablevision believes that the best means to ensure a smooth, successful transition to the era of digital electronic media is to let technology, not regulation, drive progress.

Respectfully submitted,

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